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ALEXANDER L. STEVAS,

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

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CHANNEL ISLANDS DEVELOPMENT CORP.  
d/b/a/ THE LOBSTER TRAP & CASA  
SIRENA MARINA HOTEL, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

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MICHAEL K. SCHMIER  
SCHMIER & SCHMIER  
2034 Cotner Avenue  
Los Angeles, California 90025

(213) 478-5021

Counsel for Petitioner

April 27, 1984

5078



## QUESTIONS PRESENTED

1. Whether respondent denied petitioner its right to defend the action by its refusal to look at key record evidence constituting a complete defense to the unfair labor practice charges.

2. Whether the Court of Appeals' failure to consider record evidence and refusal to resolve petitioner's contentions violates petitioner's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

3. Whether the decision below is erroneous and results in a miscarriage of justice.



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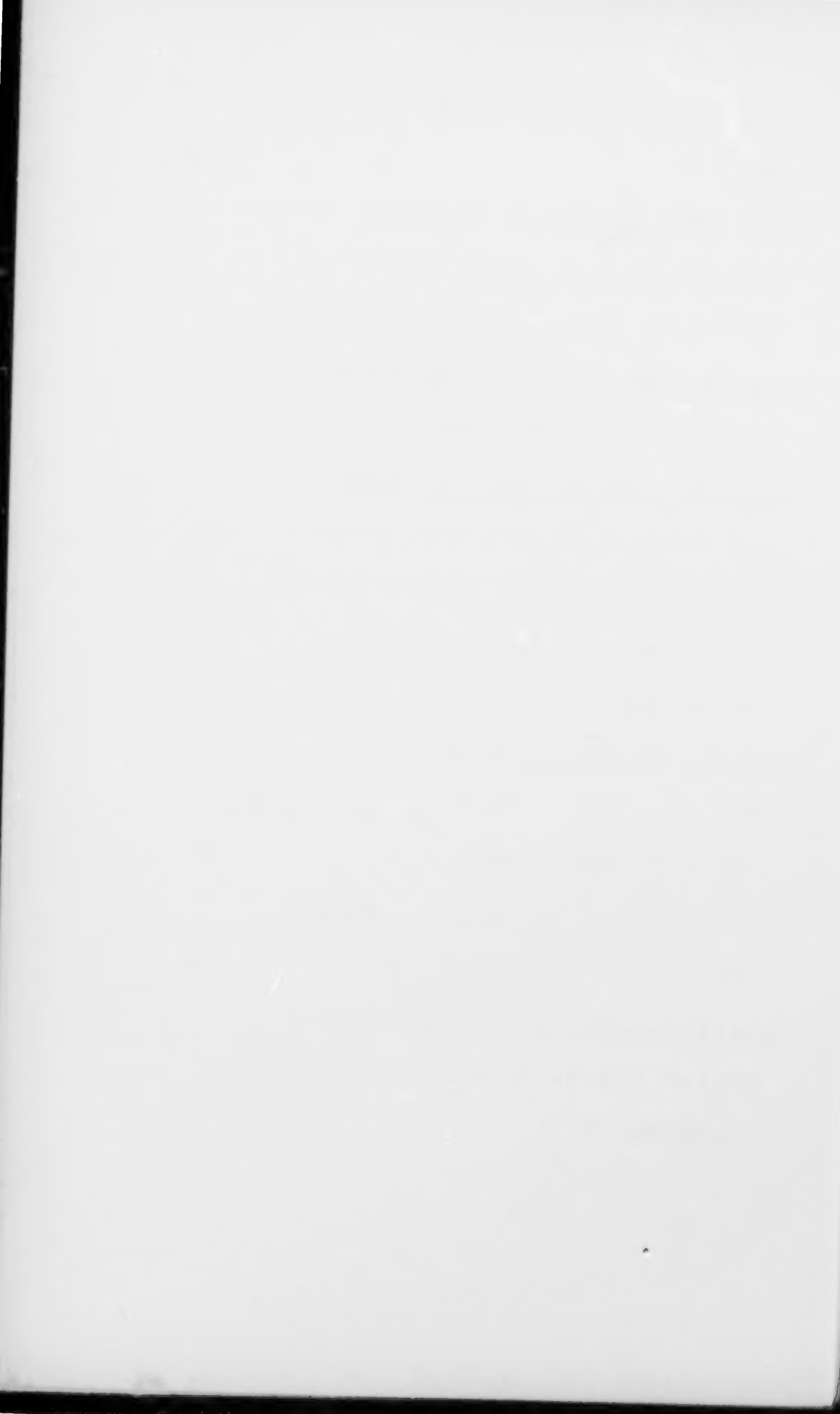
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

No.

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CHANNEL ISLANDS DEVELOPMENT CORP.  
d/b/a/ THE LOBSTER TRAP & CASA  
SIRENA MARINA HOTEL, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

---

The Petitioner, Channel Islands  
Development Corp. d/b/a/ The Lobster Trap  
& Casa Sirena Marina Hotel, respectfully  
prays that a writ of certiorari issue to  
review the judgment and opinion of the  
United States Court of Appeals for the  
Ninth Circuit entered in this proceeding  
on February 7, 1984.

←

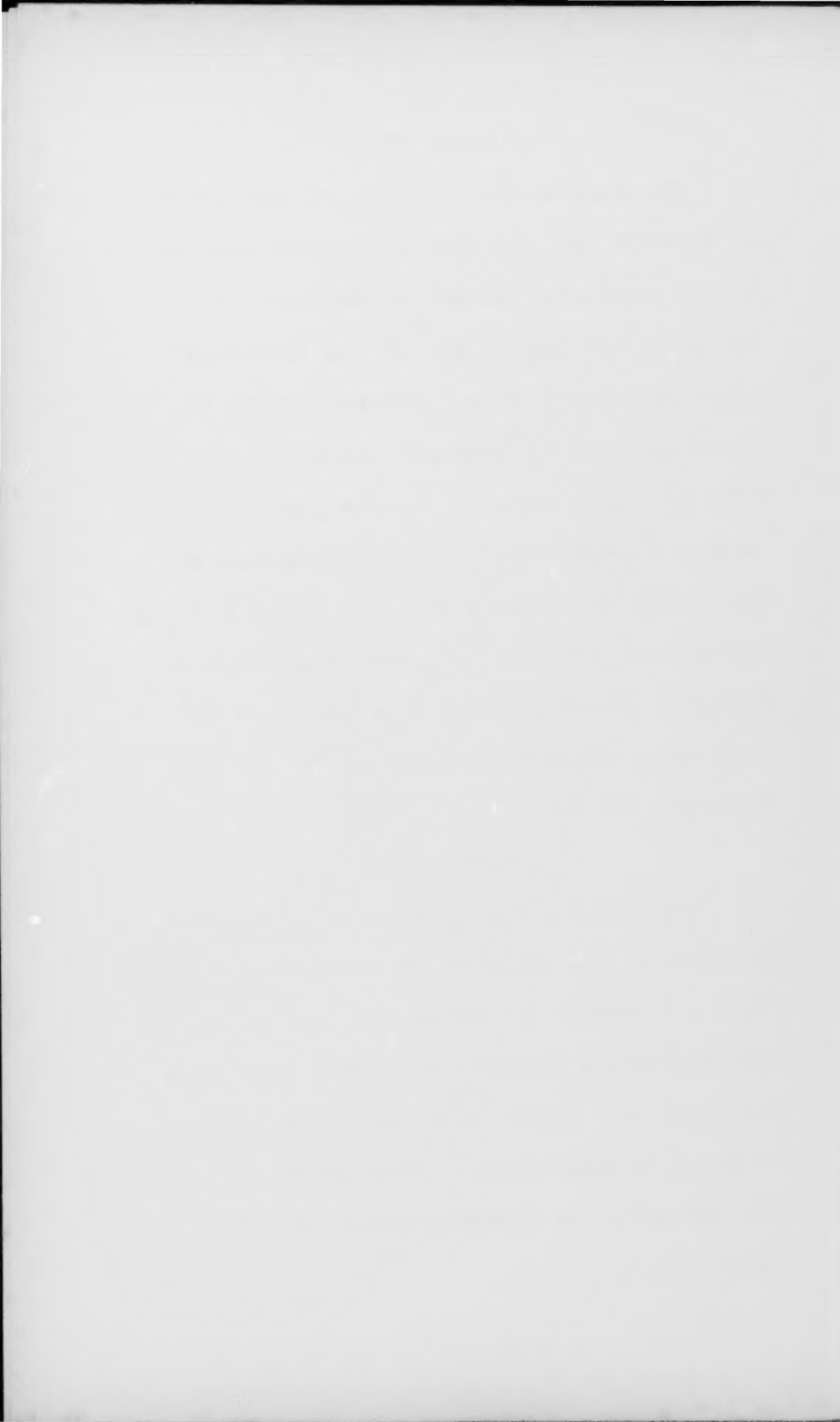
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## OPINION BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit appears in the Appendix hereto as Exhibit "1". The decision and order of the National Labor Relations Board ("respondent" or, in the alternative, "Board"), reported at 259 NLRB No. 160, appears in the Appendix hereto as Exhibit "2". The judgment of the Court of Appeals for the Ninth Circuit appears as Exhibit "3", and the Court of Appeals' order denying the petition for rehearing appears as Exhibit "4" in the appendix hereto.

## JURISDICTION

The memorandum opinion of the Court of Appeals was entered on November 14, 1983. A timely petition for rehearing was denied on January 31, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).



## QUESTIONS PRESENTED

1. Whether respondent denied petitioner its right to defend the action by its refusal to look at key record evidence constituting a complete defense to the unfair labor practice charges.

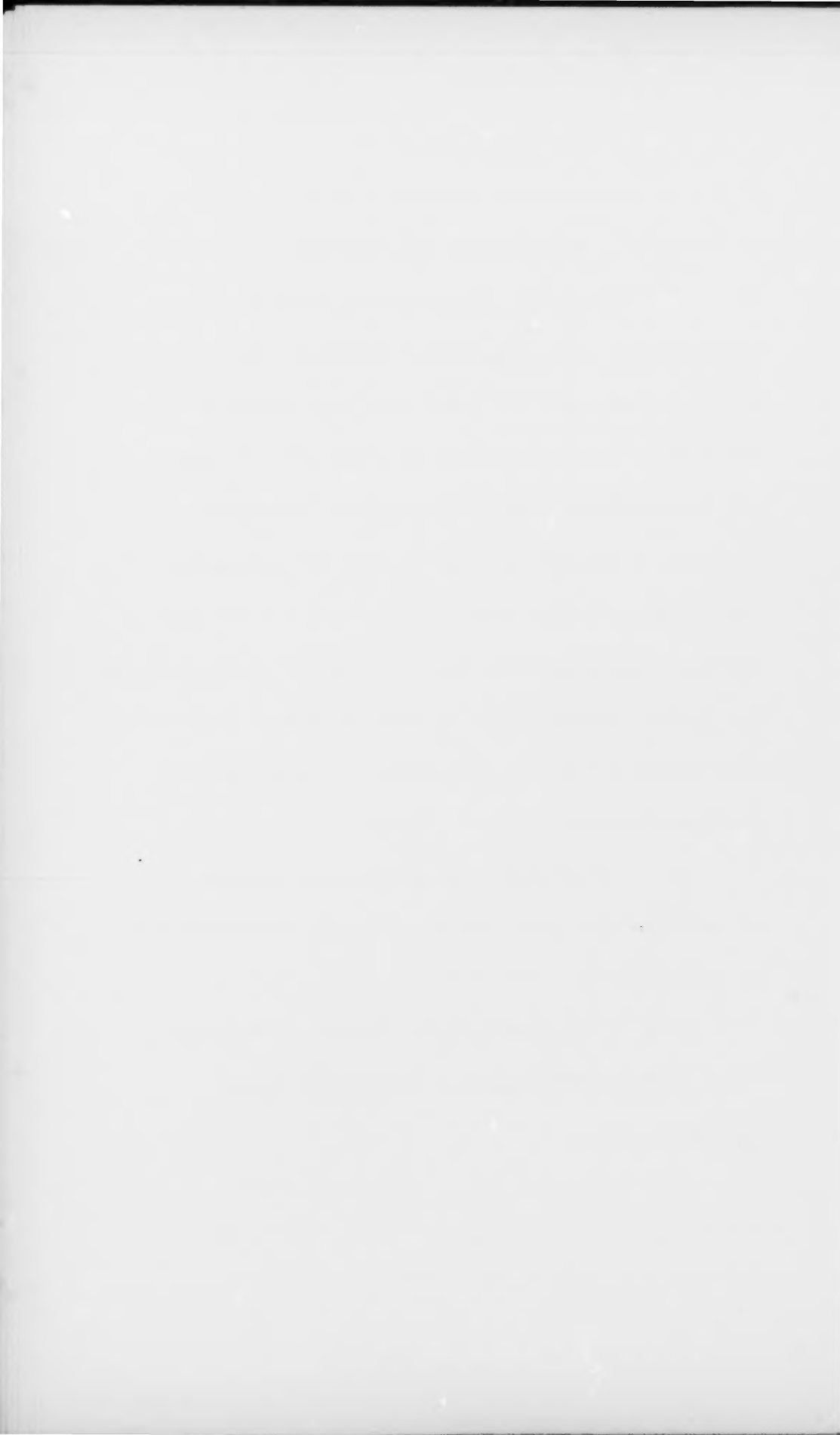
2. Whether the Court of Appeals' failure to consider record evidence and refusal to resolve petitioner's contentions violates petitioner's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

3. Whether the decision below is erroneous and results in a miscarriage of justice.

## CONSTITUTIONAL PROVISIONS INVOLVED

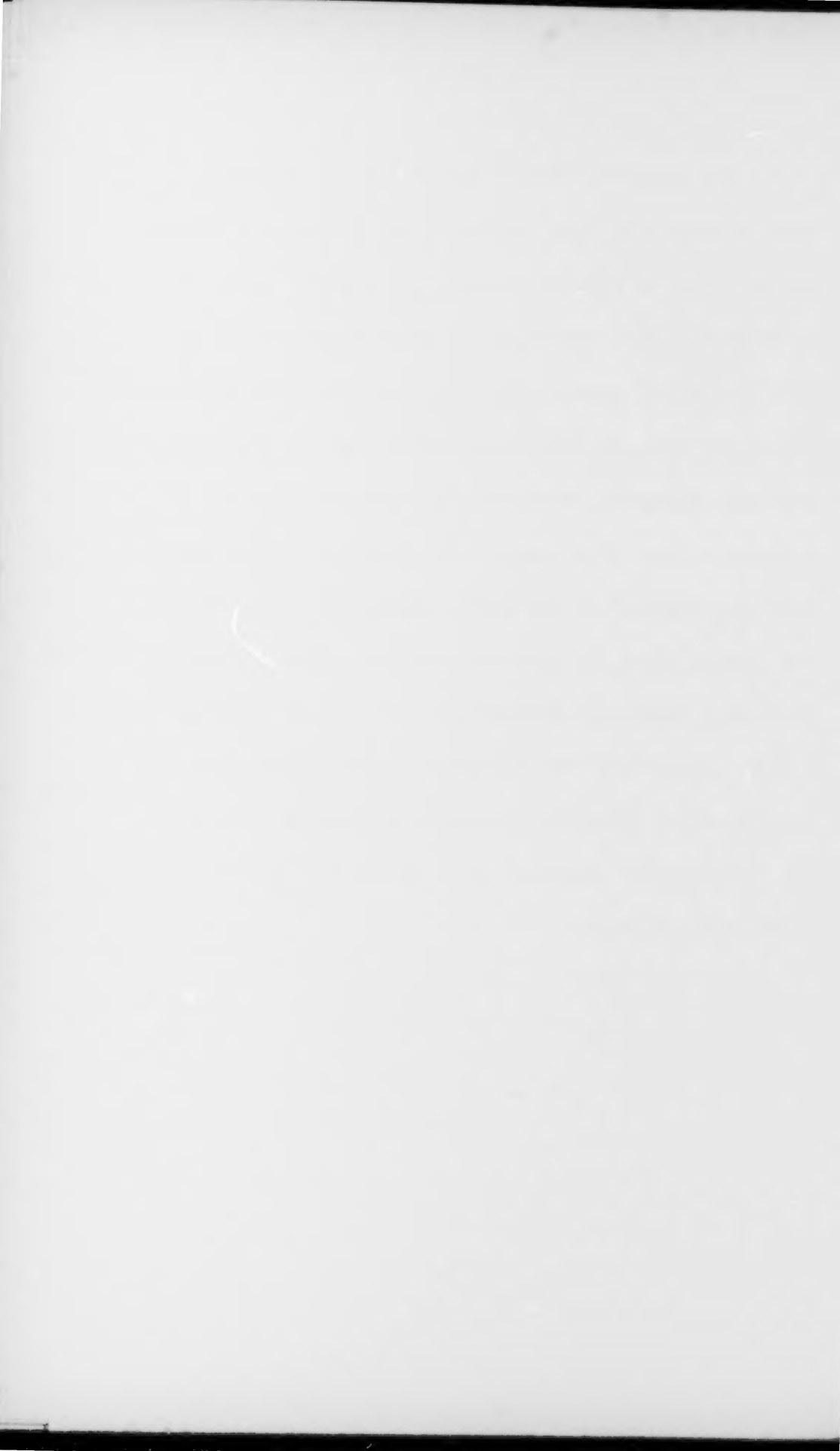
Fifth Amendment, United States

Constitution:





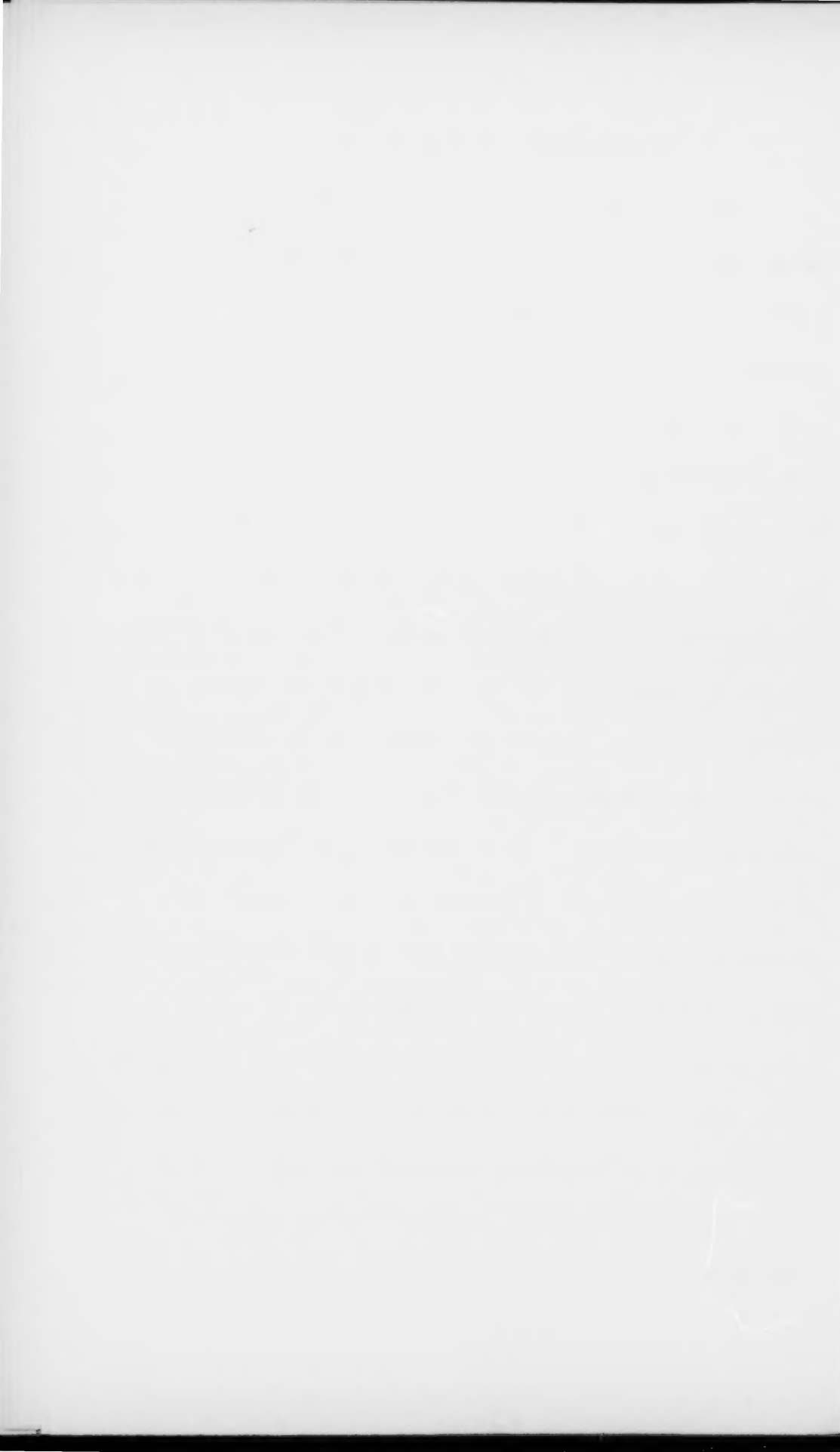
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



## STATEMENT OF THE CASE

Petitioner, Channel Islands

Development Corp., is a California corporation which was engaged in the operation of The Lobster Trap Restaurant and the Casa Sirena Marina Hotel during the pendency of this action before the National Labor Relations Board. On May 17, 1979, petitioner terminated the employment of three cooks at the restaurant facility because of an incident of rude, insubordinate, hostile behavior displayed when questioned about their unsatisfactory job performance. The Warehouse Processing and Distribution Workers Union, Local 26, International Longshoremen's and Warehousemen's Union ("Union") filed unfair labor practice charges against petitioner alleging that the cooks had been discharged for union activity. A hearing regarding this issue (and numerous other issues which are not the subject of this petition) was held

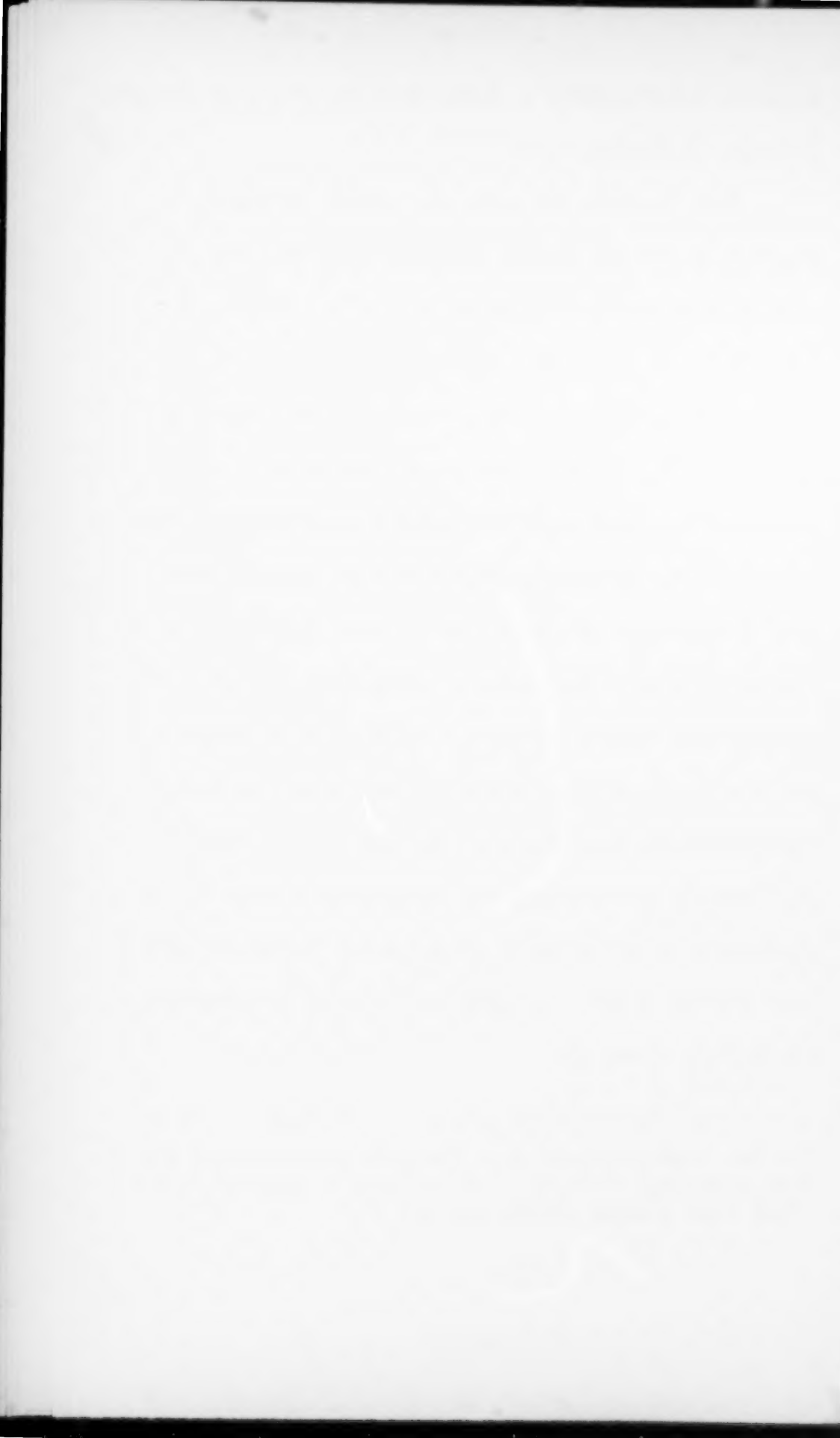


before respondent's Administrative Law Judge George Christensen.

The record is replete with evidence that the three cooks failed to perform their job duties properly. (Tr. 700-702, 763-765, 1125-1126, 1131-1135). <sup>1/</sup> During the cooks' last shift, the evening of July 11, 1979, the problems grew especially bad and customers and waitresses complained to management about incomplete and incorrect orders, cold and improperly cooked food, and unduly long delays in receiving their orders. Despite earlier warnings by their supervisor, the cooks' performance had failed to improve. The customers continued to complain about cold, poorly cooked food. The cooks became rude and surly when the head waitress attempted to hurry them up.

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<sup>1/</sup> Tr. references are to the transcript of the hearing before respondent's Administrative Law Judge Christensen.



Restaurant manager Craig Adford attempted to expedite things in the kitchen by talking to the cooks. The cooks responded to his question, "What's going on?" by angrily telling him, "If you don't like it, find yourself three more cooks." Because he wished to avoid a confrontation during the restaurant's peak business time, Adford did not respond. (Tr. 1102, 1114-1116)

Later that evening, Adford informed owner Smith of the numerous complaints from irate customers and distraught waitresses, the disruptive behavior of the cooks, and Adford's ensuing confrontation with the cooks. Smith was outraged by the cooks' behavior and ordered that they be fired. Once Smith made this decision, he left it to his administrators to implement his orders at the time most advantageous to the business. (Tr. 1102, 1114-1116)

On July 28, 1981, Judge Chr'stensen issued his decision finding that petitioner's discharge of the three cooks constituted a



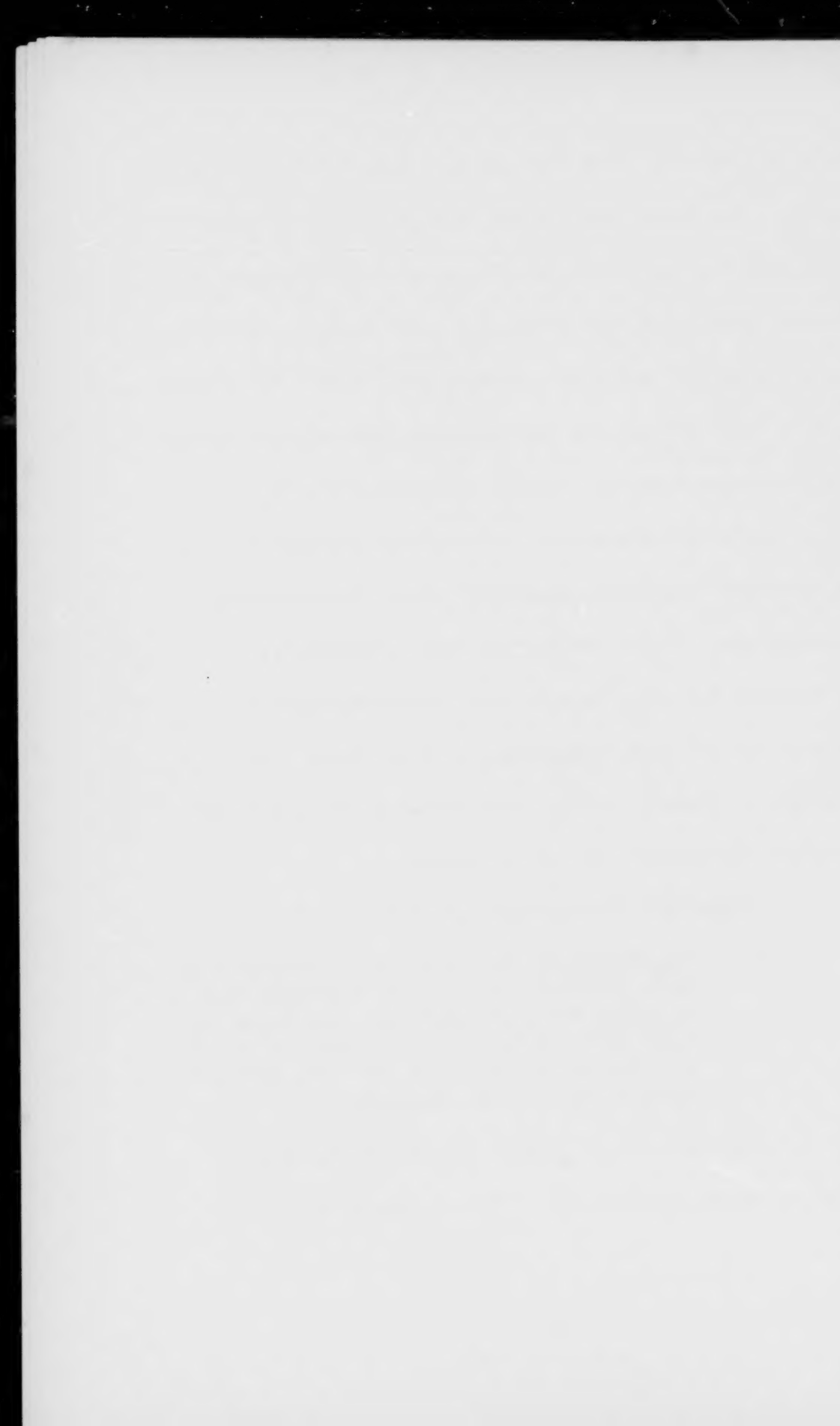


violation of the National Labor Relations Act. In that decision Judge Christensen failed to mention or otherwise indicate consideration of Smith's testimony, which was un rebutted and unrefuted, that he alone gave the order to discharge the three cooks upon learning of their insubordinate, disruptive behavior. Despite petitioner's repeated protest against this fundamental omission, this decision was routinely adopted by the Board and by memorandum opinion of two members of the Court of Appeals panel, with the strong dissent of Judge Thompson on this issue.

#### REASONS FOR GRANTING THE WRIT

1. RESPONDENT DENIED PETITIONER ITS DUE PROCESS RIGHT TO DEFEND THE ACTION BY ITS REFUSAL TO LOOK AT KEY RECORD EVIDENCE CONSTITUTING A COMPLETE DEFENSE TO THE UNFAIR LABOR PRACTICE CHARGES.

The critical issue in this case has never been resolved. That issue is that



there has never been consideration, nor indication of consideration, of crucial record evidence establishing a total defense to the unfair labor practice charge regarding the cooks, namely that the decision to discharge the cooks was made solely by petitioner's owner Smith. Smith's un rebutted testimony was never considered or mentioned by the Board's Judge Christensen in his decision. This failure to evaluate petitioner's defense is a fundamental omission constituting gross procedural error.

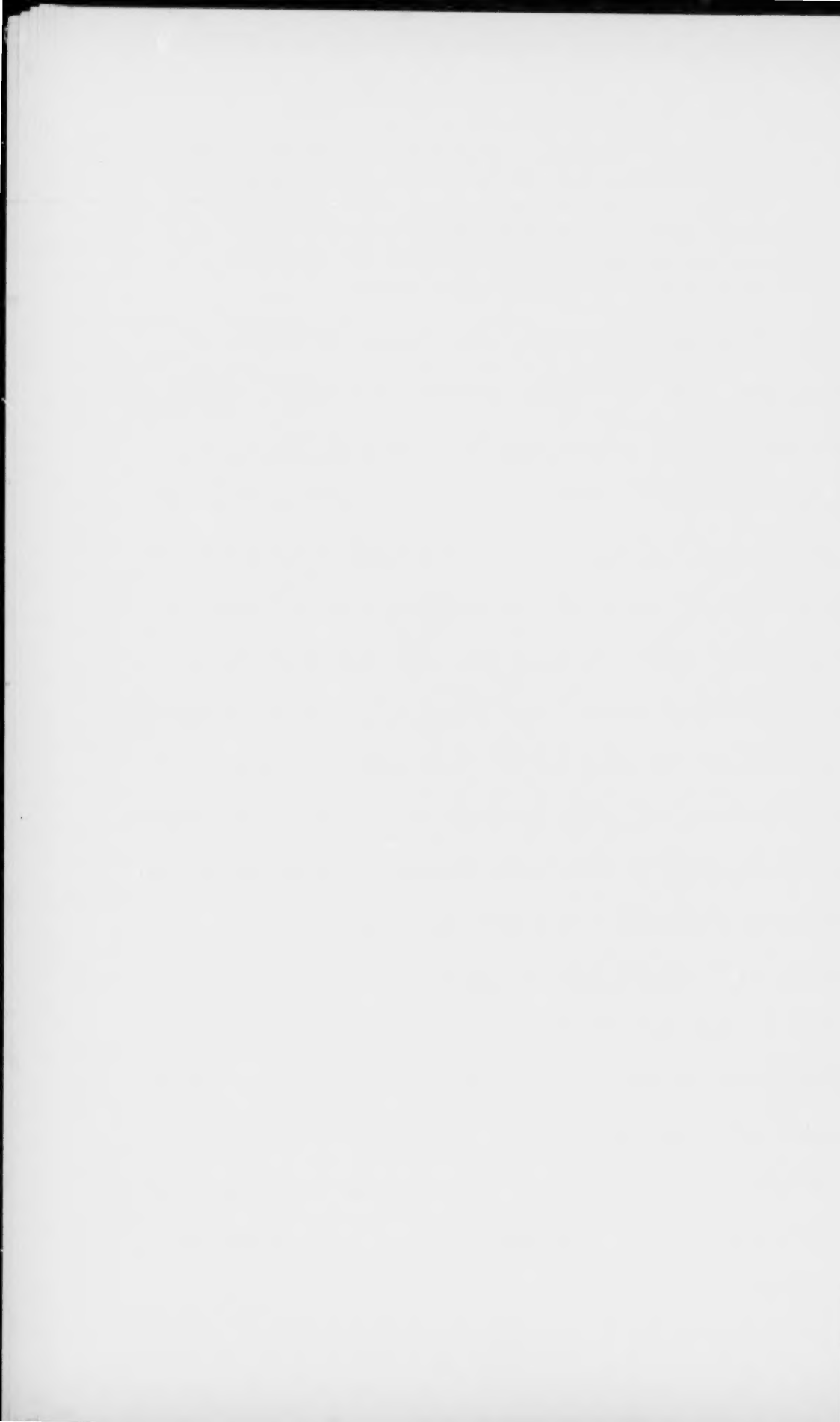
Despite petitioner's protest against this refusal to consider petitioner's contentions, respondent Board ("short form") adopted Judge Christensen's decision. Two of the three Court of Appeals panel members also failed to resolve this crucial issue, which was recognized by the third panel member, Judge Thompson, in his dissenting opinion:

There are many inconsistencies in the findings and the evidence clearly shows that the posture of the case with respect to Ignatio Cortez, Jr.,



Arnulfo Cortez, and Manuel Merino was significantly different as to each of them. The record also shows that the ALJ and the Board obdurately refused to consider and rationally resolve the employer's contentions.

The majority of the Court of Appeals' reliance on the substantial evidence rule as set forth in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) is misplaced. It cannot be said that substantial evidence in the record as a whole supports the Board's findings where a substantial portion of key witness testimony has been totally disregarded as though it had never existed. There is no indication of consideration of Smith's testimony by the ALJ or the Board in the decision-making process. Due process requires much more. cf. Hagopian & Sons, Inc. v. NLRB, 395 F. 2d 947 (6th Cir. 1968), wherein the Court of Appeals for the Sixth Circuit held that the Board's ALJ's refusal to admit or consider evidence concerning the employer's defense denied the employer a fair hearing.



As this Court stated in Universal Camera Corp. v. NLRB, supra, the Court of Appeals is not bound to rubberstamp the Board's findings where those findings are unsupported by the record and crucial testimony has been disregarded.

The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

340 U.S. at 490. Where, as here, the decision below does not reflect a complete and fair consideration of all the evidence, and fails to indicate consideration of petitioner's defense, refusal to review that decision would offend the fundamental concepts of procedural due process guaranteed by the Fifth Amendment.

Similarly, the decision of two Court of Appeals panel members to enforce the Board's order on the basis of the ALJ's credibility determinations avoids the issue.

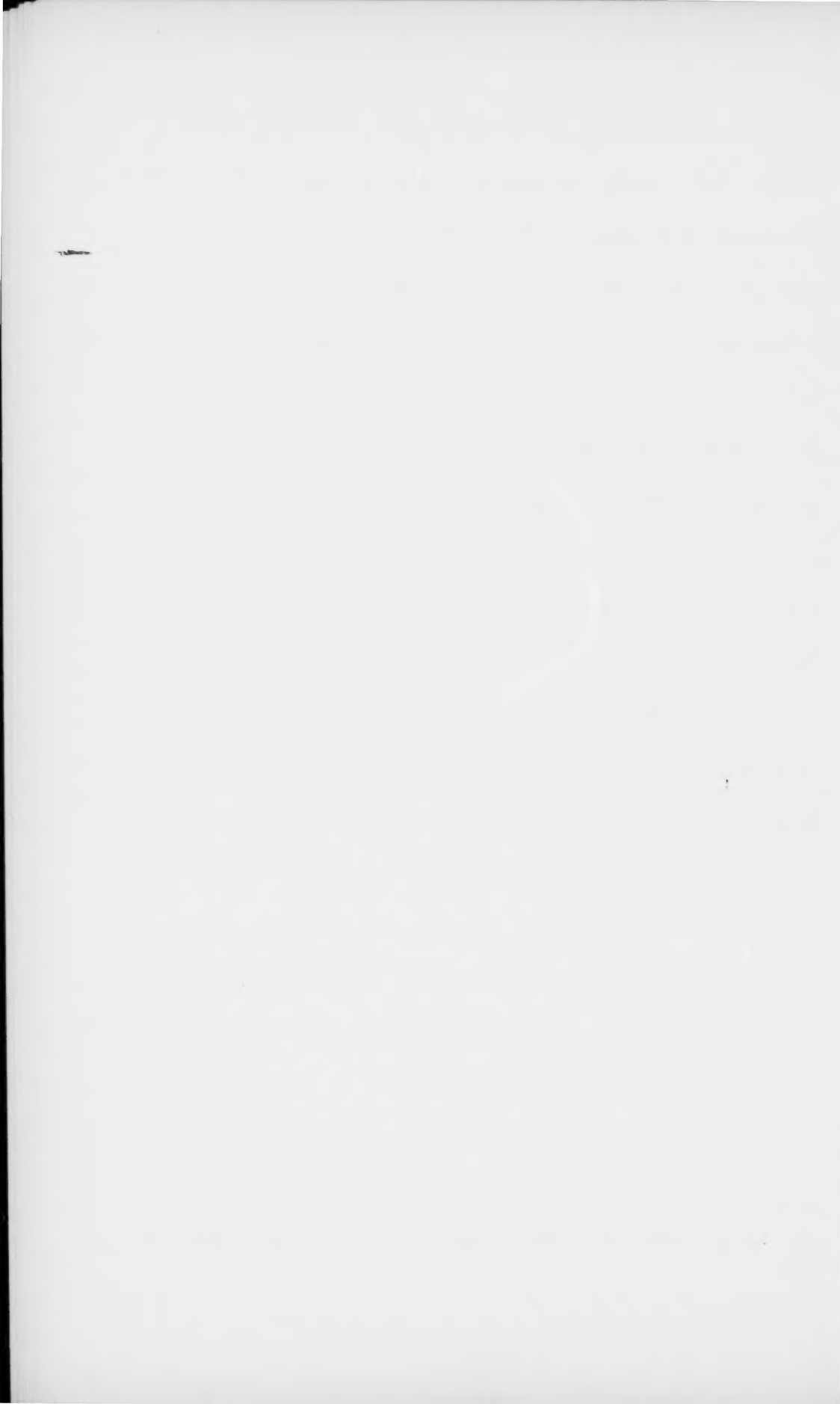




The credibility of Smith and Adford were never put into issue on appeal as they were neither refuted nor were they discredited by the ALJ or the Board, either expressly or impliedly. By logic the testimony of two of the cooks <sup>2/</sup> could not be interpreted as rebutting Smith's testimony that he ordered the discharge of the cooks or the underlying rationale for his decision because the cooks did not testify about and had no knowledge of Smith's participation in the termination. Moreover, cook Ignatio Cortez, Jr., a Board witness, corroborated much of Smith's and Adford's testimony. Cortez, Jr. admitted that he had received numerous complaints about poor food preparation and that he argued frequently with the waitresses. (Tr. 191-192, 215-216, 218) He also admitted engaging in a loud, angry conversation with Adford before he was

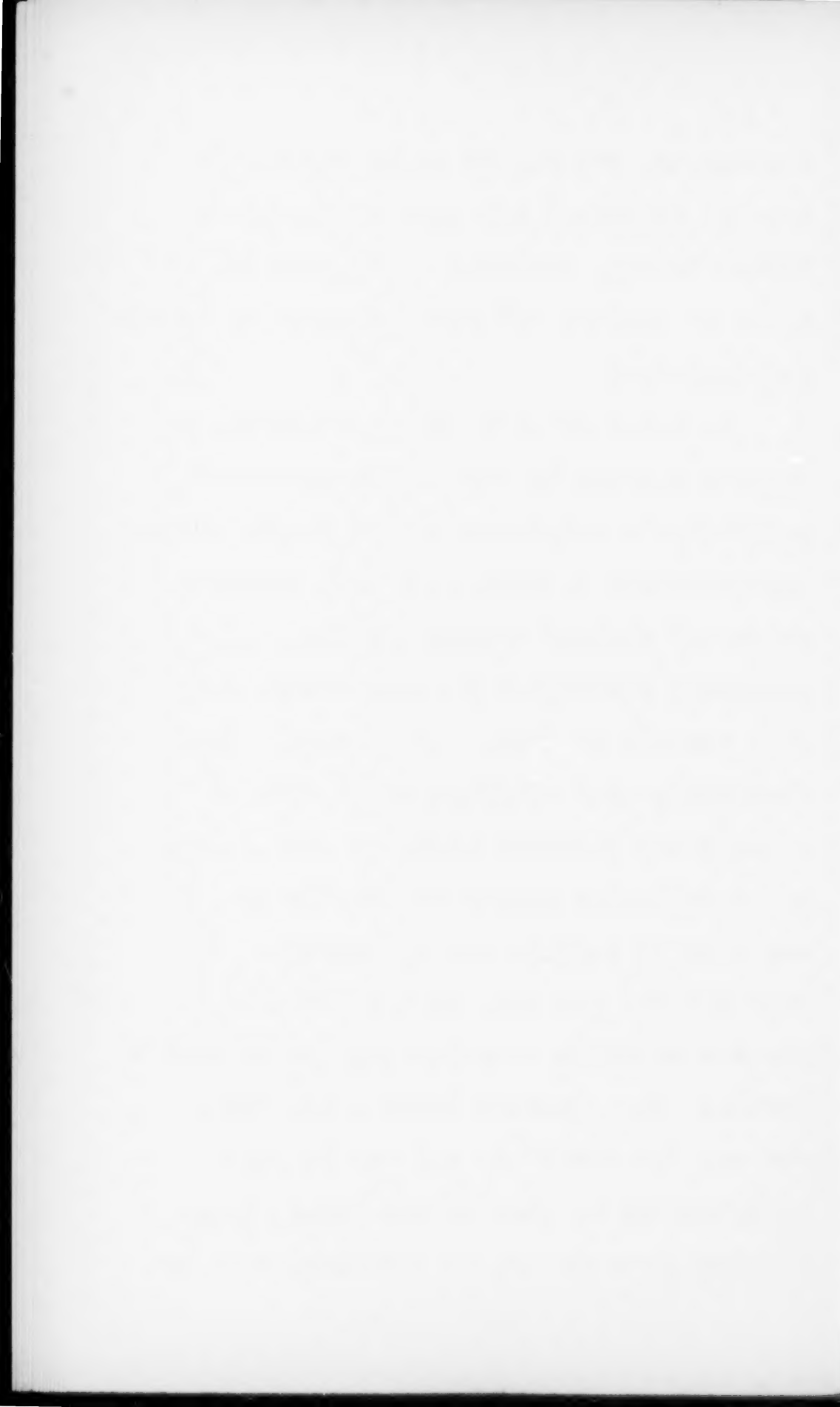
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2/ One cook did not testify at the hearing.



discharged, wherein he spoke angrily in Spanish to Adford and that another cook, Manuel Merino, insolently repeated his remarks in English (Tr 220), exactly as Adford had testified.

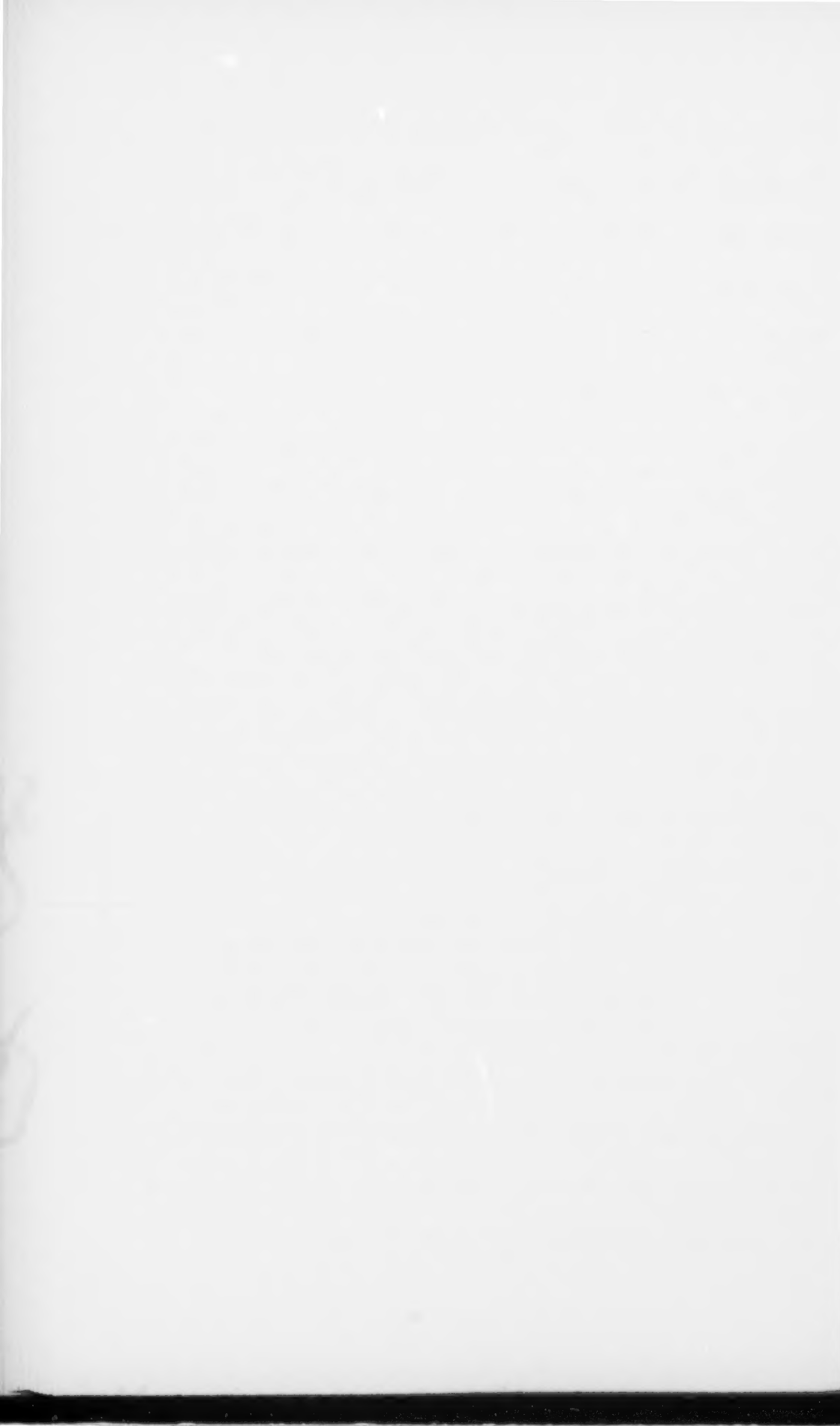
In light of this record evidence, the obvious attempt by the ALJ to discredit petitioner's witnesses with a single sweeping statement discrediting "all contrary evidence" without undergoing the requisite analytical processes must fail with respect to Smith's testimony. This frequently used administrative tool to cover every possible basis of challenging a determination cannot rationally be employed to support the ALJ herein. Not only did the ALJ fail to specifically address evidence constituting petitioner's defense, but, because Smith's testimony was not "contrary" to and was in part corroborated by that of the cooks, this blanket discrediting of testimony does not



apply to Smith. See Delco Remy Division, General Motors Corp. v. NLRB, 596 F. 2d 1295 (5th Cir. 1979), wherein the Court of Appeals for the Fifth Circuit refused to defer to the Board's ALJ's credibility determinations where the ALJ made credibility choices where none were at stake and refused to take into account undisputed conduct, just as the ALJ herein refused to consider owner Smith's undisputed testimony. The ALJ's failure to to consider crucial evidence denied petitioner its due process right to have its defense fully and fairly considered, and justifies the grant of certiorari to review the judgment below.

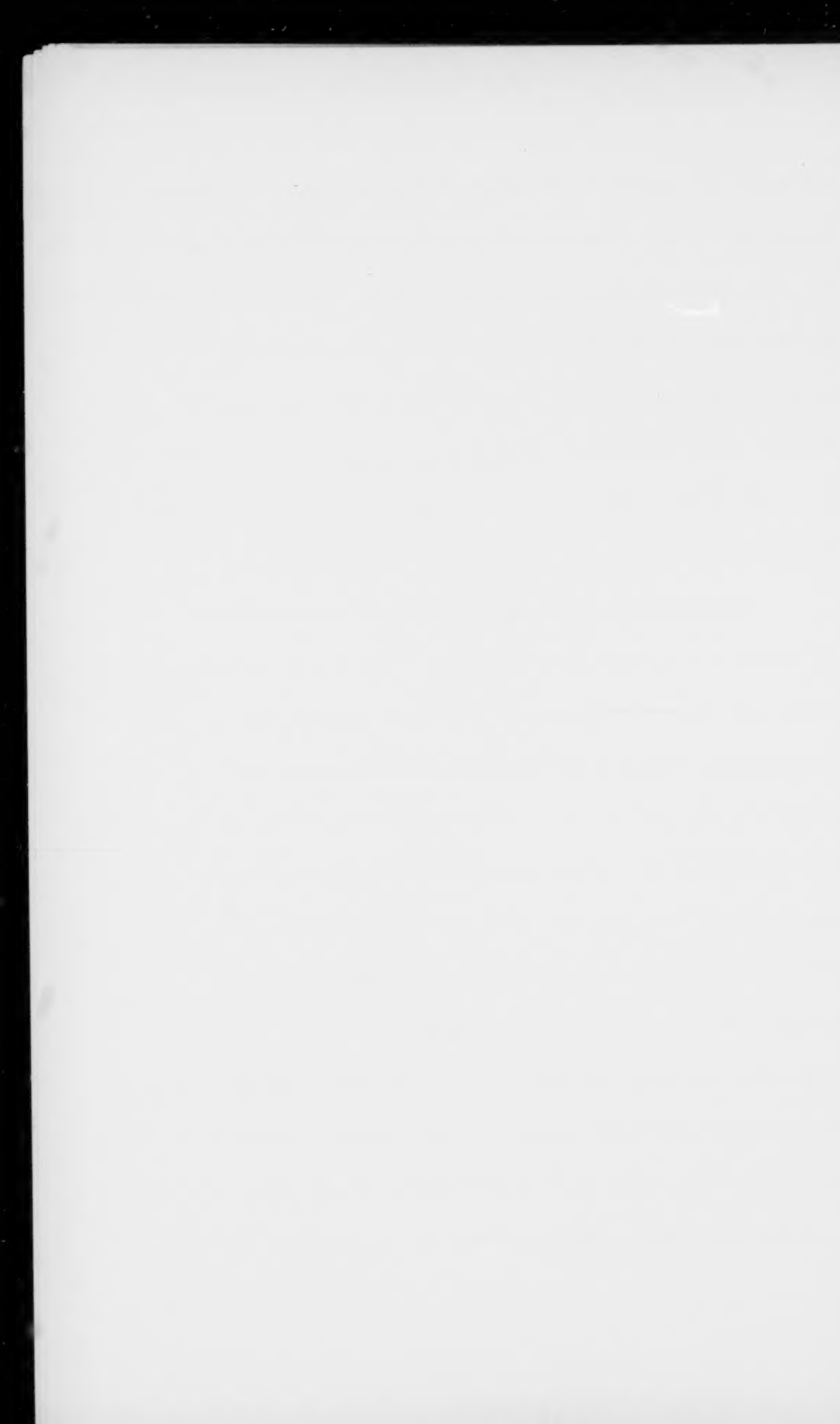
2. THE DECISION BELOW IS UNSUBSTANTIATED BY RECORD EVIDENCE OR LOGIC, AND IS SO GROSSLY ERRONEOUS AS TO CONSTITUTE A MISCARRIAGE OF JUSTICE.

The decision below indicated that the three cooks were discharged for engaging in protected activity. However, this finding is unsubstantiated by the evidence. The



record is devoid of any substantial evidence showing that the discharged employees engaged in any protected activity, and thus respondent never met its initial burden of showing that protected activity was a motivating factor in their discharges. NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981), cert. denied, 445 U.S. 989 (1982).

Petitioner was unaware of any union activity at its restaurant facility at the time of the discharges. Even assuming, arguendo, that petitioner had knowledge of such union activity, it would be totally illogical for petitioner to discharge two employees for union activity who were at most, by their own admission, mild union supporters, and a third employee who never engaged in any union activity nor signed an authorization card. The record does not support the ALJ's finding that the discharges were motivated by a desire to





frustrate union activity where one of the employees involved did not engage in any union activity, one merely signed an authorization card and the third may have passed out two cards. The irrationality of the ALJ's finding is highlighted by the fact that the most outspoken union supporter, Ignatio Cortez, Sr., the supposed union "sparkplug," was never discharged, demoted or disciplined, which has never been explained, nor even addressed by the ALJ, the Board or the two Court panel members.

Moreover, a preponderance of the evidence clearly shows that the three discharged employees would have been discharged for legitimate reasons regardless of any protected activity. 3/ The Court

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3/ A hypothetical situation is posed to the Court. Assume that federal law were modified so that this Court's law clerks were entitled to organize according to the National Labor Relations Act, as amended ("Act"). In the midst of a union drive to organize the law clerks, the Chief Justice sends a hand



of Appeals for the Ninth Circuit's analysis of the evidence in Doug Hartley, Inc. v. NLRB, 669 F. 2d 579 (9th Cir. 1982) is directly applicable to the matter herein:

---

3/ (con't)

written note directing that a certain decision be finished immediately. This mandate is then passed down to the law clerks, who have just been told by the union organizer that they need not work long hours or weekends any more and that they are entitled to lengthy coffee breaks every day. The law clerks, feeling their new power ("oats") decide that they had already worked too much this day, ignore the directive and instead engage in several hands of canasta. After a long day on the bench, the associate justices, already concerned about the Chief Justice's imminent deadline, walk into chambers and in horror, see the game. They order the law clerks to get to work at once whereupon one clerk shouts insolently in Spanish, "If you don't like it, get yourself some new law clerks." Another clerk belligerently repeats the dare in English. The reasonable reaction of each member of this Court will decide the fate of these hypothetical law clerks and thus this case. This instant, angry but legal reaction would have been exactly the same as the reaction in this case of petitioner's owner, Smith.



This is not the case of a calculated action in the midst of a bitter union campaign. We have here an immediate reaction to a blatant example of incompetence or insubordination. An employer is entitled to fire incompetent workers, and if that is a substantial motive for the discharge, there is no unfair labor practice.

Similarly, petitioner herein, through its owner Smith, made the decision immediately to terminate the three cooks upon learning of their insubordinate conduct. Not only was this a substantial motive for discharge, but it was the sole motive. The conclusion that the cooks were discharged for anti-union motivations, of which there is no evidence, and not insubordination, of which there is abundant evidence, is unreasonable and unsubstantiated by the record. NLRB v. Tayko Industries, Inc., 543 F. 2d 1120 (9th Cir. 1976). Because the correctness of the decision below is open to serious question, based upon the record evidence and logic, petitioner respectfully submits that certiorari should be granted to review and



remedy the substantial errors committed by the ALJ, the Board and the Court of Appeals.

### CONCLUSION

Consideration of evidence constituting a defense to the charges herein and evidence of same through proper articulation and explication is a fundamental requirement of the Administrative Procedure Act and of due process of law. Judge Thompson, of the Ninth Circuit Court of Appeals panel, recognized that petitioner had been denied this fundamental right and strongly criticized respondent Board in his dissenting opinion herein. The gross error committed by the Board's ALJ has never been remedied, and the issue has been repeatedly ducked by the Board and two members of the Court of Appeals panel. For all of the foregoing reasons, petitioner respectfully urges that a writ of certiorari issue to review the





judgment and opinion of the Ninth Circuit  
Court of Appeals.

Respectfully submitted,

MICHAEL K. SCHMIER  
SCHMIER & SCHMIER  
2034 Cotner Avenue  
Los Angeles, California

(213) 478-5021

Counsel for Petitioner

April 27, 1984



## APPENDIX



FILED  
NOV 14, 1983

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	) No. 82-7304
	)
	) NLRB Nos.
Petitioner,	) 31-CA-9050
	) 31-CA-9272,
vs.	) 31-RC-4493
	)
CHANNEL ISLANDS DEVELOPMENT CORP., d/b/a THE LOBSTER TRAP & CASA SIRENA MARINA HOTEL,	) MEMORANDUM*
	)
	)
Respondent.	)

---

On Application for Enforcement of an  
Order of the National Labor Relations Board  
Argued and submitted March 11, 1983

Before: SCHROEDER and Pregerson, Circuit  
Judges, and THOMPSON, \*\*District  
Judge.

This case is before the court upon

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\*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21, of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

\*\*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

EXHIBIT "1"



## BEST AVAILABLE COPY

application of the National Labor Relations Board for enforcement of its January 25, 1982 order directed to respondent, Channel Islands Development Corp., d/b/a The Lobster Trap, a restaurant, and Casa Sirena Marina Hotel, a hotel. The charges against The Lobster Trap were filed by the Warehouse, Processing & Distribution Workers Union, Local 26, International Longshoremen's and Warehousemen's Union, on June 4, 1979. The charges against the hotel were filed by the Culinary Appliance and Bartenders Union Local 498, Hotel & Restaurant Employees & Bartenders International Union, on August 8, 1979 and November 2, 1979. All the unfair labor practice charges arose out of efforts by the respective unions to organize the employees of the respective businesses. All charges were consolidated in one complaint. Channel Islands moved to sever the restaurant and hotel proceedings and the motion was denied.





Channel Islands makes three assignments of error: (1) the order of consolidation and denial of severance were prejudicial error; (2) the representation petition should be dismissed and the order for a new election reversed because the authorization cards were tainted by supervisory influence; and (3) the finding that three of the restaurant cooks were discharged for union activity and the order to reinstate them are not supported by substantial evidence.

First, consolidation is a matter that lies within the NLRB's discretion and its action will be upset only for an abuse of discretion. NLRB v. Local Joint Executive Board of Hotel and Restaurant Employees, 301 F.2d 149 (9th Cir. 1969). The facts that the same corporation was the employer, operating two enterprises, that the same attorneys represented the parties and that all occurrences were in substantially the same time frame, argue in favor of



consolidation and are consistent with the purposes of the National Labor Relations Act and the avoidance of unnecessary costs and delay. Channel Islands argues that consolidation was inconsistent with the NLRB's treatment of the hotel and restaurant as separate bargaining units. An appropriate bargaining unit, however, is selected on the basis of a sufficient community of interests among the employees. NLRB v. Retail Clerks Local 588, 587 F.2d 984 (9th Cir. 1978).

Such a consideration has little influence on the exercise of discretion to consolidate. There was no abuse of discretion.

Second, the contention that the representation petition should be dismissed recommends action which is beyond our jurisdiction. This court cannot directly review an election order and affirm or reverse it. Boire v. Greyhound Corp., 376 U.S. 473 (1964); Associated General Contractors of California, Inc. v. NLRB, 340 U.S. 474 (1951); Humes Electric, Inc. v. NLRB,



715 F.2d 468 (9th Cir. 1983). In this case, the employer contends the incident which triggered the May 17 discharge was an insubordinate remark uttered by Cortez, Jr. during the May 11 evening workshift. The ALJ rejected this defense on the basis that four employees were threatened with discharge for a remark attributed to only one; the employees' supervisor gave conflicting explanations for the discharges and never told the three cooks that they were being discharged for alleged insubordination; the discharges followed closely after the employer learned there was union activity among the restaurant employees; and the supervisor advised Cortez, Jr. that he could not secure reinstatement unless he, his brother and Merino agreed to refrain from supporting a union. In addition, the ALJ expressly credited the testimony of the three members of the Cortez family and expressly discredited all contrary testimony, a finding to which we must give deference. See NLRB v. Max



Factor & Co., 640 F.2d 197 (9th Cir. 1980),  
cert. denied, 453 U.S. 983 (1981). Taken  
together, these factors constitute substan-  
tial evidence in support of the proposition  
that the three cooks were unlawfully dis-  
charged.

Consequently we enforce the NLRB's  
order.

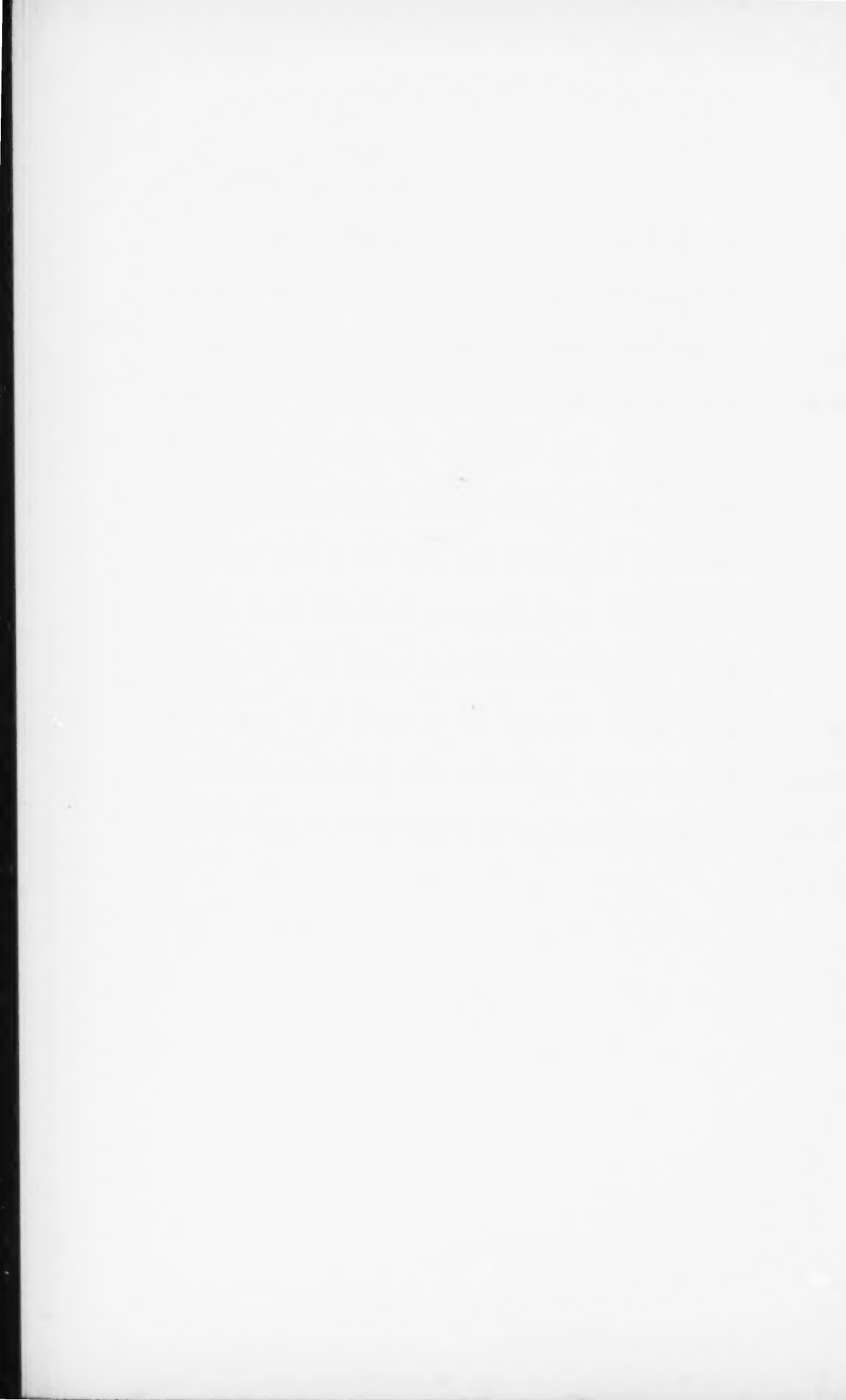




FILED  
NOV 14, 1983

THOMPSON, DISTRICT JUDGE, dissenting.

I respectfully dissent from that portion of the memorandum which affirms the NLRB's reinstatement order. There are many inconsistencies in the findings and the evidence clearly shows that the posture of the case with respect to Ignatio Cortez, Jr., Arnulfo Cortez, and Manuel Merino was significantly different as to each of them. The record also shows that the ALJ and the Board obdurately refused to consider and rationally resolve the employer's contentions.



259 NLRB No. 160

FJZ  
D--8446  
Oxnard, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHANNEL ISLAND DEVELOPMENT  
CORP., d/b/a THE LOBSTER  
TRAP & CASA SIRENA MARINA  
HOTEL

Cases  
31-CA-9050,  
31-CA-9272  
and  
31-RC-4493

and

WAREHOUSE, PROCESSING &  
DISTRIBUTION WORKERS UNION,  
LOCAL 26, INTERNATIONAL  
LONGSHOREMEN'S & WARE-  
HOUSEMEN'S UNION

and

CULINARY ALLIANCE &  
BARTENDERS UNION, LOCAL  
498, HOTEL & RESTAURANT  
EMPLOYEES AND BARTENDERS'  
INTERNATIONAL, AFL-CIO

DECISION, ORDER, AND  
DIRECTION OF SECOND ELECTION

On July 28, 1981, Administrative Law  
Judge George Christensen issued the attached  
Decision in this proceeding. Thereafter,  
Respondent filed exceptions and a supporting  
brief.

Pursuant to the provisions of Section 3(b)

EXHIBIT "2"

App. 8



of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record<sup>1</sup> and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

1. Respondent's request for oral argument is hereby denied as the record and briefs adequately present the issues and positions of the parties.

2. We find without merit Respondent's allegations of bias on the part of the Administrative Law Judge. There is no basis for finding that bias or partiality existed only because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court has stated "total rejection of an opposed view cannot of itself impugn the integrity or competence of trier of fact." NLRB v. Pittsburgh Steamship Co., 337 U.S. 656, 659 (1949). Moreover, as it is the Board's established policy not to overrule an administrative law judge's resolutions as to credibility except where, as is not the case here, the clear preponderance of all the relevant evidence convinces us that



## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below,

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### 2. (cont'd)

the resolutions were incorrect, we find, contrary to Respondent's contention, no basis for disturbing the Administrative Law Judge's credibility findings. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951).

3. In affirming the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) when executive housekeeper Palacio interrogated employees on or about April 23, 1979, we note that Palacio only admitted asking employees if they had heard anything about a union representative being at the hotel over the weekend. Employee witnesses credibly testified, however, that Palacio also inquired whether cards had been circulated and whether the employees had been asked to join a union. Although we find Palacio's admitted interrogation sufficient to establish a violation, we find the further interrogations established by credited testimony were likewise unlawful.

In adopting the Administrative Law Judge's recommendation to set aside the election, we do not rely on Palacio's unlawful interrogation of employee Cortez inasmuch as it occurred after the election, according to Cortez' credited testimony.





and hereby orders that the Respondent, Channel Island Development Corp., d/b/a The Lobster Trap & Casa Sirena Marina Hotel, Oxnard, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Expunge from its files any reference to the discharges of Arnulfo Cortez, Ignation Cortez, Jr., and Manuel Merino on May 17, 1979, and notify them, in writing, that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election in Case 31-RC-4493 be, and it hereby is, set



# BEST AVAILABLE COPY

aside, and that a new election shall be conducted in accordance with the Direction of Second Election set forth below.

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 31 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status



as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>4</sup> Those eligible

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4. In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly it is hereby directed that an election eligibility list, containing the names and addresses



shall vote whether or not they desire to be represented for collective bargaining purposes by Culinary Alliance & Bartenders Union, Local 498, Hotel & Restaurant Employees and Bartenders International, AFL-CIO.

Dated, Washington, D.C. January 25, 1982

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John H. Fanning, Member

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Howard Jenkins, Jr.,  
Member

---

Don A. Zimmerman, Member

(SEAL)

NATIONAL LABOR RELATIONS  
BOARD

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4.(cont'd)

of all the eligible voters, must be filed by the Employer with the Regional Director for Region 31 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.



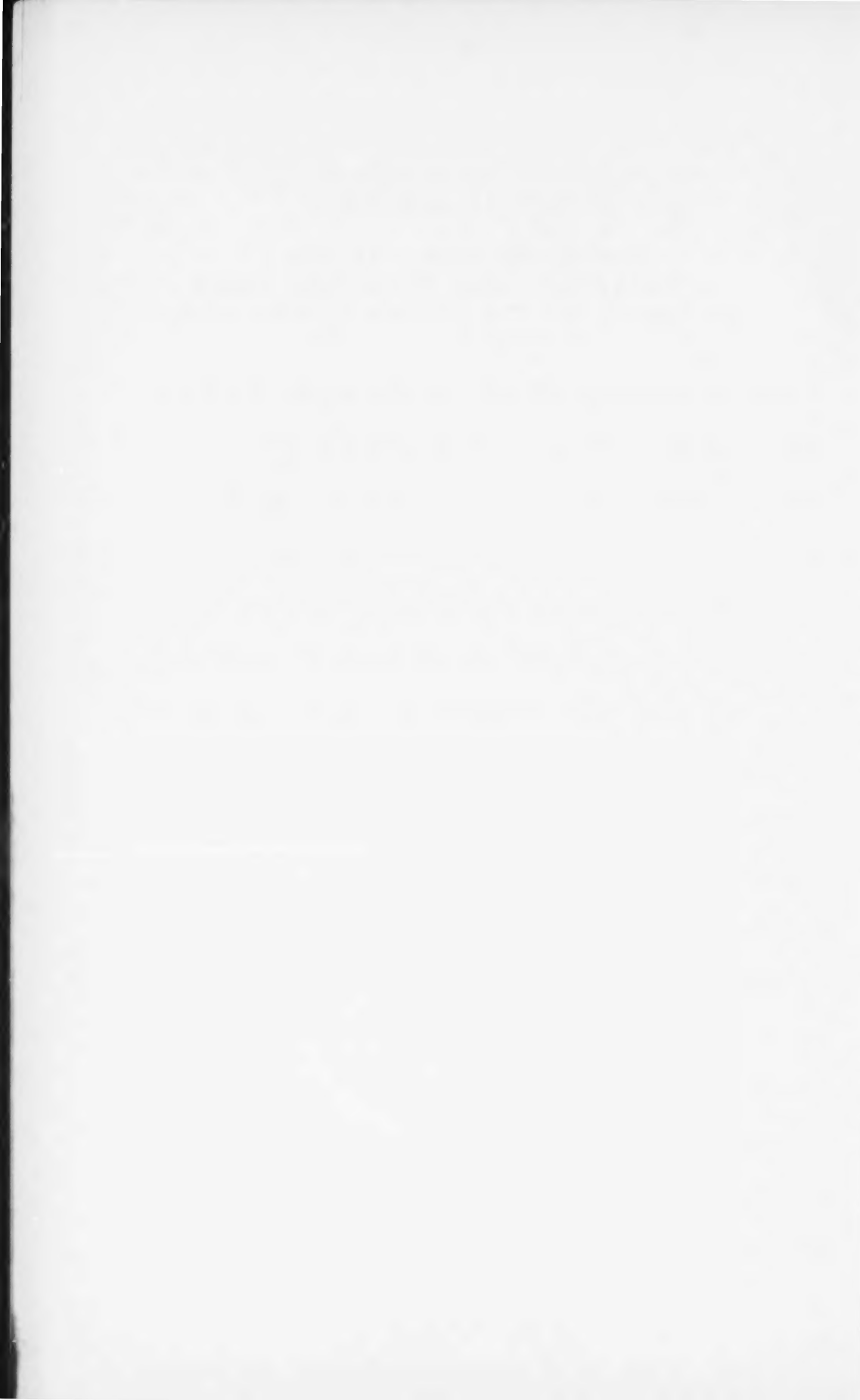


APPENDIX  
NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Govern-  
ment

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their and other employees' activities on behalf of, sympathy for, or their desires with respect to representation by Warehouse, Processing & Distribution Workers Union; Local 26, International Longshoremen's & Warehousemen's Union, or Culinary Alliance & Bartenders Union, Local 498, Hotel & Restaurant Employees and Bartenders International, AFL-CIO, or any other labor organization.



WE WILL NOT maintain a surveillance of our employees' activities on behalf of either of the above or any other labor organizations.

WE WILL NOT threaten to demote our employees because of their activities on behalf of the above named or any other labor organization.

WE WILL NOT threaten our employees with discharge to discourage employees from seeking and securing representation by the above named or any other labor organization.

WE WILL NOT discharge our employees to discourage our employees from seeking and securing representation by the above named or any other labor organization.

WE WILL NOT condition the reinstatement of any employees discharged to discourage their and other employees' support of the above named or any other labor organization on their abstention from that support.

WE WILL NOT grant wage increases to



discourage our employees from seeking and securing representation by the above named or any other labor organization.

WE WILL NOT promise improvements in wages and benefits if our employees will refrain from seeking and securing representation by the above named or any other labor organization.

WE WILL NOT threaten reductions in wages and benefits if our employees seek and secure representation by the above named or any other labor organization.

WE WILL NOT threaten our employees with the futility of seeking and securing representation by Local 498 by threatening not to sign any contract with that union containing wage and benefit provisions unless that contract contains wage and benefit provisions lower than those we currently provide.

WE WILL NOT solicit grievances from



our employees and promise to resolve them to discourage their seeking and securing representation by the above named or any other labor organization.

WE WILL NOT otherwise interfere with, restrain or coerce our employees in the exercise of their rights under Section 7 of the Act to form, join, or assist the above named or any other labor organization, to bargain collectively through the above named or any other labor organization, to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection, or to refrain from any or all of those activities.

WE WILL reinstate Arnulfo Cortez, Ignatio Cortez, Jr., and Manuel Merino to their former positions or, if those positions no longer exist, to substantially equivalent positions, if necessary terminating any employees hired to replace them.





WE WILL expunge from our files any reference to the discharges of Arnulfo Cortez, Ignatio Cortez, Jr., and Manuel Merino on May 17, 1979, and WE WILL notify them that has been done and that evidence of the unlawful discharge will not be used as a basis for future discipline against them.

WE WILL make those three employees whole for any wage and benefit losses they have suffered because we discharged them to discourage their and other employees' union support, with interest.

CHANNEL ISLAND DEVELOPMENT CORP.  
d/b/a THE LOBSTER TRAP &  
CASA SIRENA MARINA HOTEL

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(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning



this notice or compliance with its provisions may be directed to the Board's office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7357.



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	NLRB# 31-CA-9050,
	)	31-CA-9272 &
Petitioner,	)	31-RC-4493
	)	No. 82-7304
vs.	)	
	)	JUDGMENT
CHANNEL ISLANDS DEVELOPMENT CORP., d/b/a	)	
THE LOBSTER TRAP & CASA	)	CENTRAL CALIFORNIA
SIRENA MARINA HOTEL	)	
	)	
Respondent.	)	

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Upon Application for Enforcement of  
an Order of the National Labor Relations  
Board

This Cause came on to be heard on  
the Transcript of the Record from the  
National Labor Relations Board on  
March 11, 1983.

and was duly submitted.

On Consideration Whereof, it is now  
here ordered and adjudged by this Court,  
that the application for enforcement of the  
order of the National labor (sic) Relations  
Board in in (sic) this Cause be, and hereby  
is ENFORCED.

FILED AND ENTERED: November 14, 1983

EXHIBIT "3"

APP. 21



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	No. 82-7304
	)	
Petitioner,	)	NLRB Nos.
	)	31-CA-9050,
vs.	)	31-CA-9272, and
	)	31-RC-4493
CHANNEL ISLANDS	)	
DEVELOPMENT CORP., d/b/a/	)	ORDER
THE LOBSTER TRAP & CASA	)	
SIRENA MARINA HOTEL,	)	
	)	
Respondent.	)	
<hr/>		

Before: SCHROEDER and PREGERSON, Circuit Judges, and THOMPSON,\*\* District Judge.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

EXHIBIT "4"

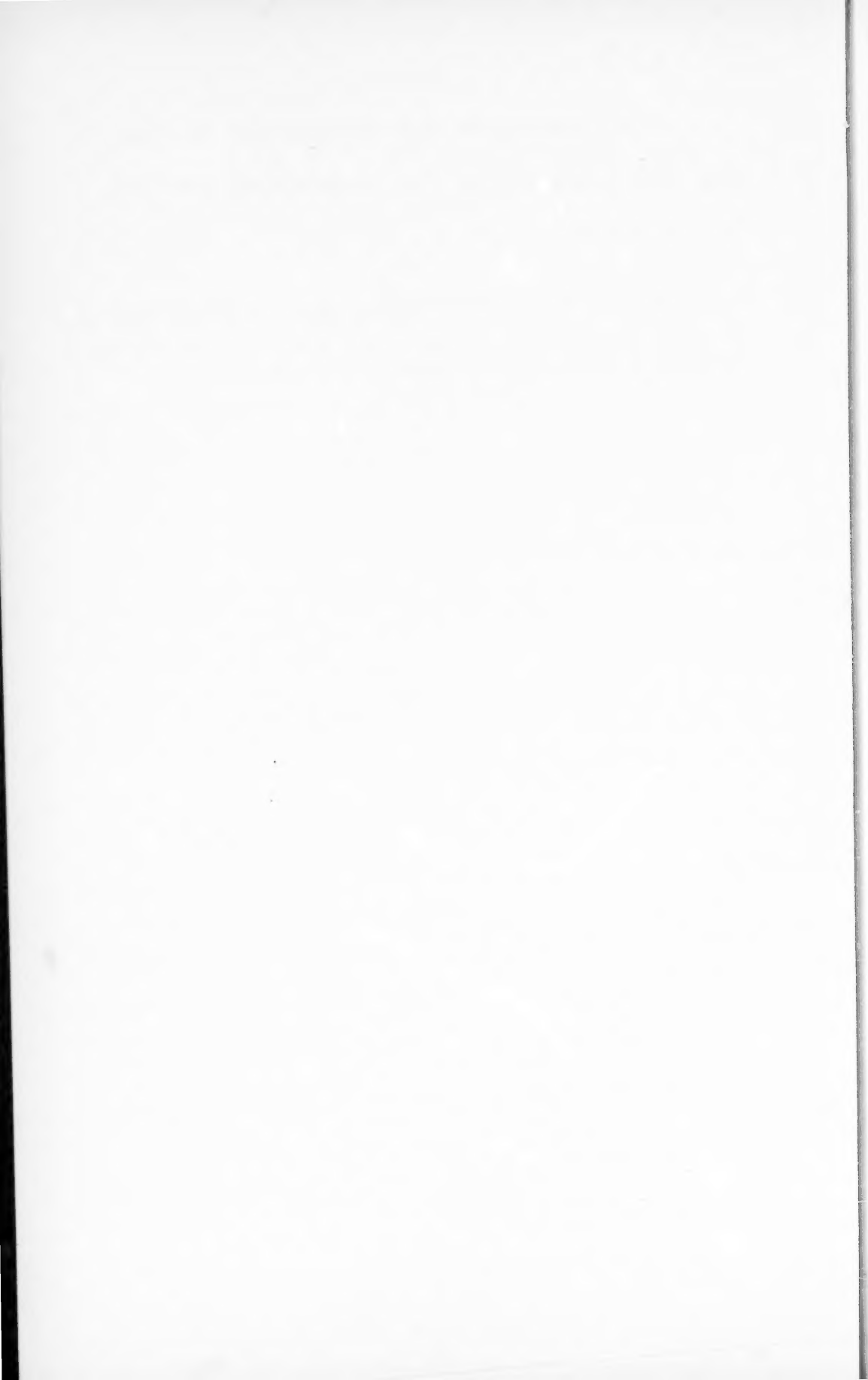




The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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\*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.



IN THE  
SUPREME COURT OF THE UNITED STATES

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No.

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CHANNEL ISLANDS DEVELOPMENT CORP.  
d/b/a/ THE LOBSTER TRAP & CASA  
SIRENA MARINA HOTEL, Petitioner,

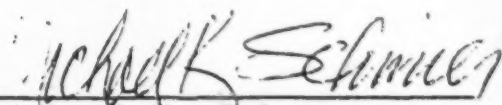
v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 1984, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Elliot Moore, Esq., National Labor Relations Board, Office of General Counsel, 1717 Pennsylvania Avenue, Washington, D.C. 20507, counsel for Respondent. I further certify that all parties required to be served have been served.

  
Michael K. Schmier  
SCHMIER & SCHMIER  
2034 Cotner Avenue  
Los Angeles, CA 90025  
(213) 478-5021

Counsel for Petitioner